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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-181

STATE ELECTRIC SERVICE INC.,

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

STATE ELECTRIC SERVICE, INC.,
Petitioner

versus
NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit

Petitioner, State Electric Service, Inc., petitions for a Writ of Certiorari to issue to review the Decision of the United States Court of Appeals for the Fifth Circuit in this case published April 19, 1973, on which Judgment was entered May 11, 1973, and Petition for Rehearing was denied June 14, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals, printed in the Appendix to this Petition, pages 13-20 is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for

the Fifth Circuit was dated and entered May 11, 1973, (Appendix, p.21). Rehearing was denied by that Court on June 14, 1973. (Appendix p.23). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Has the Court of Appeals by ignoring a Decision of the National Labor Relations Board, rendered subsequent to the Board's Decision and Order in the instant case and prior to the Court's enforcement of that Order, which decision substantially alters the principle of law applicable to this case, so far departed from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision?

STATUTORY PROVISION INVOLVED

"Section 8(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a)."
29 U.S.C. § 158(a)(1)(5).

STATEMENT OF THE CASE

This action was initiated in the Court

below when the National Labor Relations Board (hereinafter referred to as the "Board") sought enforcement of its Order of July 31, 1972, in the United States Court of Appeals for the Fifth Circuit. In its Order the Board found State Electric Service, Inc. (hereinafter referred to as "Petitioner") in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 158(a)(5)(1)). The basis for federal jurisdiction in the Court of first instance, the United States Court of Appeals for the Fifth Circuit, was Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 160(e), granting the National Labor Relations Board the power to petition the United States Court of Appeals for the Circuit wherein the unfair labor practice in question occurred when seeking enforcement of its Order. The Court below rendered its Decision, enforcing the Board's Order against Petitioner, on April 19, 1973, on which Judgment was rendered May 11, 1973. A Petition for Rehearing by State Electric Service, Inc. was denied by the Court below on June 14, 1973.

Since 1963, Local 1001, International Brotherhood of Electrical Workers (hereinafter referred to as the "Union") has negotiated collective bargaining agreements with various electrical contractors in the Panama City, Florida area. The contractors were loosely organized for bargaining purposes into a group known as the Panama City Electrical Contractors. (R. 10-11).[1] The Union

---

1. References to the Official Report of Proceedings, a portion of the record certified by the Court below and transmitted to this Court, will be abbrievated "R." followed by the page number.

and the contractors association normally negotiated and executed one year contracts effective from September to September. During the term of the 1967-1968 contract Petitioner, through its President, Peterson, executed a letter of assent adopting the contract then in effect between the Union and the Association. From that time until August 1970, Petitioner participated in the yearly negotiations and was a willing party to the collective bargaining agreements of September 1968 and September 1969. (R. 8-9, 14, 17).

During August 1970, a dispute arose between Petitioner and the Union. The dispute centered upon which contractual wage rate - the industrial rate of the lower commercial rate - was to be paid on a certain small electrical job at Tyndall Air Force Base. The Union Business Manager attempted unsuccessfully to contact Petitioner's Peterson who was required to be out of town at other job sites from pre-dawn until late at night during this time. On Thursday, August 20, the Union instructed Petitioner's four workers on the Tyndall job not to report for work the next day. (R. 124, 126-127, 45). Peterson then hired new employees to finish the job, withdrew from active participation in the contractors bargaining association, and declined to abide by the new contract effective September 14, 1970. (R. 151-153).

In October 1972, the Union Business Manager arranged a meeting between Petitioner's Peterson and John Coleman, an International Representative for the Union. (R. 55). At the hearing before the Board Trial Examiner, Peterson could not recall the details of the discussion between he and Coleman but did recollect that they discussed the dispute between Petitioner and the Union and the

industrial versus the commercial rate. Peterson also testified that he had a recording of his conversation with Coleman although the recording was not introduced in evidence. (R. 148-150).

Upon these facts the Board concluded that by refusing on and after September 14, 1970, to abide by the contract entered into on its behalf by the Panama City Electrical Contractors, Petitioner continued to engage in an unfair labor practice within the meaning of Section 8(a)(5) of the Act. It ordered Petitioner to cease and desist from refusing to give effect to the collective bargaining agreement, to give retroactive effect to the terms of the collective bargaining agreement and to make whole its employees for any loss of pay suffered by reason of Petitioner's refusal to abide by the collective bargaining agreement. (Appendix pp. 14). The Court below upheld the Board's Decision and found support for the Board's conclusion that "...State Electric never effectively repudiated or withdrew from the multi-employer bargaining unit so as to not be bound by the contract to become effective on September 14, 1970." The Court enforced the Board's Order in all respects. (Appendix pp.20)

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Board's Order was rendered on July 31, 1972. The Decision of the Court of Appeals, enforcing the Order was published on April 19, 1973.

Subsequent to the Board's Order and prior to its enforcement, the Board issued its Opinion in the case of I. C. Refrigeration Service, 200 NLRB No. 107, on December 1, 1972.

The I. C. Refrigeration Service case represents a significant departure from previously enunciated Board precedent with respect to the binding effect of collective bargaining agreements, negotiated by multi-employer associations, upon unwilling members of such associations. Petitioner submits that had the instant case been considered by the Board or the lower Court in light of the principles set forth in I. C. Refrigeration Service, a different result would have obtained.

The I. C. Refrigeration case was not brought to the attention of the Court below in briefs filed by either the Board's General Counsel nor previous counsel for Petitioner. Neither was it cited in the lower Court's Decision. Petitioner petitioned the Court below to permit rehearing of the matter, submitting that the Court had overlooked the point of administrative law contained in I. C. Refrigeration Service, and requested reconsideration of the case in light of the applicable principles. The Petition for Rehearing below was denied. The failure of the Court of Appeals to grant such rehearing constitutes such a substantial departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Since the 1958 case of Retail Associates, Inc., 120 NLRB No. 66A, the Board has consistently imposed strict limitations upon a party's withdrawal rights from an established multi-employer bargaining relationship. In Retail Associates, Inc. the Board prescribed these ground rules for permitting withdrawals:

(1) The decision to withdraw must be unequivocal; it must be made in good faith; and it must contemplate

abandonment, on a permanent basis, of multi-employer bargaining and embracement of bargaining on an individual basis;

(2) An employer or union may withdraw only upon an adequate written notice given prior to the date set for modification of the employer association contract or for the start of multi-employer bargaining.

(3) Where multi-employer negotiations have begun, withdrawal will be permitted only if there is mutual consent, in the absence of unusual circumstances.

In Anderson Lithograph Company, 124 NLRB No. 117, enforced in NLRB v. Jeffries Bank Note Company, 281 F.2d 893 (9th Cir. 1960), the Board held that two members of the multi-employer bargaining unit violated the Act by refusing to sign the multi-employer contract, even though the union improperly had concluded individual agreements with other members of the association. Neither of the two employers had unequivocally withdrawn from the multi-employer unit before agreement had been reached on the new contracts.

Later the Board found an employer obligated to sign a contract negotiated by a multi-employer group even though he had given notice of an intent to withdraw and had filed an election petition before the contract was signed. Sheridan Creations, Inc., 148 NLRB 1503. The Second Circuit upheld the Board's ruling, reasoning that multi-employer bargaining is based upon the consent of the parties to deal with one another through the agree unit. A shift of membership after negotiations had begun is disruptive of the

bargaining process, the court observed. NLRB v. Sheridan Creations, Inc., 357 F.2d 245 (2nd Cir., 1966); cert. denied 385 U.S. 1005; rehearing denied 386 U.S. 969.

In the I. C. Refrigeration Service case, supra, the Administrative Law Judge concluded that four contractors violated Section 8(a)(5) and (1) of the Act by refusing to abide by a 1970 collective bargaining agreement negotiated by a multi-employer bargaining association of which the Respondents were members. In so concluding the Administrative Law Judge found that the Respondents did not unequivocally withdraw from the multi-employer bargaining unit prior to the execution of the agreement. In a two-to-one decision the three member Board, consisting of Chairman Miller and members Fanning and Penello, reversed the conclusion of the Administrative Law Judge.

The facts showed negotiations for a new contract between the union and the employer association commenced on May 13, 1970, and continued up until July 1 when the old contract expired and the union struck the association members. Between July 10 and July 15, the four Respondent contractors submitted letters resigning from the association. On August 30, or 31, the union and association negotiators reached agreement and the strike ended. The four Respondent contractors refused to sign the contract and the union filed 8(a)(5) charges against them on November 4, 1970.

The Board based dismissal of the charges upon its finding that the union had acquiesced in the four contractors withdrawal from the employer association. The case represents a significant departure from previous holdings

of the Board, since the decision of the four companies to resist execution of the collective bargaining agreenent came after the multi-employer negotiations had been concluded.

The facts of the I. C. Refrigeration case are similar to those presented in the instant case. It is clear from the record that there are, or may be, circumstances in the instant case which indicate acquiescense by the Union to State Electric's withdrawal from the multi-employer association - even absent timely and unequivocal notification by State Electric.

The Union Business Representative arranged a meeting in October, 1973, between John Coleman, the International Representative for the IBEW, and State Electric's Peterson, almost three months after the contract negotiations had been concluded, and a month after its effective date. (R. 55). The following colloquy between counsel for the General Counsel and witness Peterson leaves the record unclear as to whether Coleman and Peterson discussed individual settlement between the Union and State Electric:

"Q Did you tell Mr. Coleman that you considered the contract canceled?

A I don't know.

Q You don't remember? Do you know or do you not know, or do you not remember?

A I told you that I don't remember if I told him or not.

Q Do you remember your conversation with him?

A With Mr. Coleman?

Q with Mr. Coleman.

A Yes, I've got a recording of that conversation.

***

Q What did you tell him?

A We just talked about all the problems.

Q You talked about your problems?

A Yes.

***

Q Did you talk to Mr. Coleman about the original dispute, about the letter of the industrial and commercial rates?

A Right.

Q What did he say about that?

A I don't remember what he even said about that now.

Q But, you did talk to him on or in October of 1970 about that situation?

A Right.

Q About those things?

A We discussed everything as far as what was going on.

Q Did you resolve the problems?

A No.

Q Were you trying to resolve the problems with him?

A Yes, I tried to resolve them with him." (R. 148-150; emphasis supplied).

The implication is that Coleman and Peterson discussed problems incidental, not only to the strike, but to the issue of "industrial" versus "commercial" rates which had been a matter of negotiation. This conversation does not appear consistent with the Union's position (taken three months later) that it had a binding contract with State Electric effective September 14, 1970. The full text of the conversation between Coleman and Peterson might well reveal that the Union acquiesced in State Electric's withdrawal from the association by attempted negotiation of an individual settlement.

Although the Board found that no "claim of acquiescence by the union" was raised by Respondent (Appendix pp. 18), this case was heard, briefed, and decided prior to the decision in I. C. Refrigeration Service. Under the rigid Board principles regulating withdrawals from employer associations and existing prior to I. C. Refrigeration, no purpose would have been served by raising such a claim.

Subsequent to the Board's Decision and Order in this case, and prior to the Court's enforcement of the Board's Order, the Board has rendered a Decision which substantially changes the principle of law applicable to this case. Petitioner submits that the applicable case was overlooked by the Court below in its Decision rendered April 19, 1973. Further, the failure of the Court below to grant rehearing in the matter and remand the

case to the Board for consideration in light of the controlling principle of law represents a substantial departure from the accepted and usual course of judicial proceedings. Petitioners submits that the appropriate action of the Court below would have been to vacate its Judgment and remand the case to the Board for reconsideration. Duke Power Company v. Greenwood, 299 U.S. 259, 268 (1936).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its Petition for Writ of Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit be granted, that an Order to that effect be entered, and the Court below and the counsel be notified of the granting of the Petition.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS

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APPENDIX

13

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3477

Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

STATE ELECTRIC SERVICE, INC.,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Florida Case)

(April 19, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: The National Labor Relations Board in this case seeks enforcement of its order against respondent State Electric Service, Inc. The

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*Rule 18, 5 Cir., See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Board's decision and order of July 31, 1972, is reported at 198 N.L.R.B. No. 77. The Board found that the company violated sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to abide by a contract negotiated and executed in its behalf by a multi-employer association. We find substantial evidence to support the Board's holding and grant enforcement of its order.

For several years State Electric had been a member of a multi-employer bargaining group which negotiated contracts with Local 1001 of the International Brotherhood of Electrical Workers. The 1969-70 contract was set to expire on September 13, 1970. By August 21, 1970, agreement had been reached on a contract for the next year, to be effective on September 14th. This agreement was executed by the association (Panama City Electrical Contractors) and the union.

During August 1970, a dispute arose between the union and State Electric. This dispute centered on which contractual wage rate — the industrial rate or the lower commercial rate — was to be paid on a certain small electrical job at Tyndall Air Force Base. The company maintained that the lower commercial rate was applicable while the union felt otherwise. Evidence shows that the union business manager attempted several times to discuss the matter with State Electric's president, Peterson, but received no response. On August 20th, in light of the failure of response from Peterson, the business manager instructed the employees not to work the next day on the Tyndall job. The union members did not work on the job again there-

after. On August 26th, Peterson fired all of his employees and hired replacements.

The issue in this case is whether or not the work stoppage by the employees was sufficient to justify State Electric's termination of the contract for 1969-70, and its refusal to abide by the contract effective September 14, 1970, for 1970-71. The Board held that State Electric was bound by both contracts.

The contracts for both of the two above periods contained "no strike" clauses, but these clauses differ significantly. The 1969-70 agreement contained a no strike clause which provided:

> There shall be not (sic) stoppage of work either by strike or walkout because of any proposed changes in the agreement.

The contract effective on September 14th, for the next year, expanded the no strike clause to read:

> There shall be no stoppage of work either by strike or walkout because of any proposed changes in the agreement or dispute over matters relating to this agreement.

At the same time, both contracts contained a broad arbitration clause:

> During the term of this agreement all questions or disputes shall be taken up for adjustment between the duly selected representatives of both parties to this agreement.

If the representatives of the parties could not agree, the contracts provided for binding arbitration.

The work stoppage in question occurred while the 1969-70 contract with the circumscribed no strike clause was in effect. It is uncontroverted that the work stoppage was not over proposed changes to the agreement. The union has contended that its work stoppage was simply an attempt to force State Electric to discuss or arbitrate the wage dispute. The facts establish that president Peterson failed to respond to numerous telephone requests from the union for a meeting. On August 14th, the union sent a letter to Peterson requesting a labor-management representative meeting as required by the arbitration section of the agreement. When no response was forthcoming in six days, the work stoppage occurred. The union did, finally, unilaterally invoke the grievance procedure in September, 1970. Peterson was notified by registered mail of the meeting of the joint conference committee but failed to reply or appear. The committee, consisting of both contractor and union representatives, found that *State Electric*, not the union, had violated the contract by failing to follow the grievance procedure.[1]

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[1]The opinion of the joint committee includes the following paragraph:

> After consideration discussion and question the committee finds that the local union put forth extra effort and consideration in trying to arbitrate this matter in good faith and under the terms of this agreement, and at the same time showing the union's regards to Mr. Peterson as an individual and as an employer.

Although Peterson met with union officers at various times after this stoppage and arbitration, his union employees did no more work on the job. It apparently is State Electric's position that the work stoppage was a total breach of contract by the union, relieving it of any contractual obligations to the union. Although it never properly withdrew from the multi-employer group, it refused to abide by the contract agreed to by the group and the union.

The NLRB held that the union's work stoppage was not a violation of the contract because of the limited "no strike" clause therein. Therefore, it held the failure to continue to deal with the union was a violation of the Act.

In challenging the NLRB's holding, petitioner State Electric relies on *Teamsters Union* v. *Lucas Flour Company*, 369 U.S. 95 (1962), for the proposition that a no strike clause is to be implied coextensive with an existing arbitration clause and that a strike over an arbitrable grievance was a violation of the contract. The Supreme Court has seemingly retreated from the full implications of the broad language in *Lucas Flour*. The Court stated in *Drake Bakeries* v. *Local 50*, 370 U.S. 254, 261 (1962):

> However, this court has prescribed no such inflexible rule rigedly linking no-strike and arbitration clauses of every collective bargaining contract.[7]

The Court then added that it did not think previous cases had established "a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting." *Id.*, f.7. Here, of course, unlike *Lucas Flour*, there was a *bargained-for* no-strike clause which was obviously more limited than the arbitration clause.

Even if *Lucas Flour* does require a coextensive no strike clause here, we see other reasons why the employer cannot prevail. First, as noted, the union made every effort, excluding the unsatisfactory one of forcing unilateral arbitration, to have this matter settled as provided in the contract. Secondly, in *Lucas Flour* the strike was designed to compel the employer to agree to the union's position as a substitute for the contractually agreed to arbitration. In the present case, however, the work stoppage was unquestionably designed simply to force the company to acknowledge the existing dispute and to make the company comply with the contract by arbitrating the matter. It is unchallenged that the union was not attempting to use the stoppage mechanism to force the employer's acquiesence to an issue which the arbitrator could decide, rather it was solely in response to the employer's refusal to abide by the very clause which he now claims the union has breached. Thus, this is not "a strike to settle a dispute which a collective agreement provides shall be settled exclusively and finally by compulsary arbitration" as was the case in *Lucas Flour*, 369 U.S. at 105.

Furthermore, we think it well settled that a union's breach of a no strike clause (assuming there was such a breach in this case) is not automatically sufficient to breach the entire contract. The Supreme Court has held that a union's breach of a no strike clause does not justify an employer's subsequent refusal to arbitrate, as required by the contract, the underlying dispute which gave rise to the stoppage in the first place. See *Packing House Workers* v. *Needham Packing Company*, 376 U.S. 247 (1964); *Drake Bakeries, Inc.* v. *Bakery & Confectionery Workers*, 370 U.S. 254 (1962). If a breach of a no strike clause is not enough to relieve the employer of his duty to arbitrate the issue giving rise to the illegal work stoppage, it can certainly not automatically be held that a breach of a no strike clause terminates the entire contract with the union. Here, assuming that the union did indeed breach its obligation by calling the stoppage, under the circumstances of this case that does not seem sufficient to justify the employer's position that the entire contract was rendered void. As noted here, there is a serious question as to whether the work stoppage was an illegal work stoppage within an *implied* no strike clause based on the *Lucas Flour* decision. At most, it would seem the employer only had an action against the union for any damages growing out of the stoppage or a suit for a possible injunction under *Boys Markets*.[2] In fact, even here there is a strong argument that the employer's only course of action would require his filing a grievance and resorting to arbitra-

[2]*Boys Markets, Inc.* v. *Local 770, Retail Clerks Union*, 398 U.S. 235 (1970).

tion over whether or not this was an illegal work stoppage.

The employer chose not to attempt any of these "peaceful" remedies. Rather, it appears he simply decided to take this opportunity to rid himself of the union once and for all. After consideration of all the evidence, we find ample support for the Board's conclusion that State Electric never effectively repudiated or withdrew from the multi-employer bargaining unit so as to not be bound by the contract to become effective on September 14th. Therefore, the order of the NLRB in this case is

ENFORCED.

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U. S. COURT OF APPEALS
FILED
MAY 11 1973
EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 72-3477
STATE ELECTRIC SERVICE, INC., Respondent.	)	

JUDGMENT

Before: GEWIN, COLEMAN and MORGAN, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, State Electric Service, Inc., its officers, agents, successors, and assigns. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for disposition without oral argument, on April 19, 1973, handed down its decision granting enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, State Electric Service, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: MAY 11 1973

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 72-3477
	)	
STATE ELECTRIC SERVICE, INC.	)	
	)	
Respondent,	)	

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by first class mail on the following counsel at the address listed below:

Isler, Welch, Bryant, Smith,
Higby & Brown
Att: Lynn C. Higby, Esq.
343 Magnolia Avenue
Panama City, Florida 32401

/s/ Elliott Moore
Elliott Moore
Acting Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 24th day of April, 1973.

U. S. COURT OF APPEALS
FILED
JUN 14 1973
EDWARD W. WADSWORTH
CLERK

23

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3477
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

STATE ELECTRIC SERVICE, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Florida Case)

ON PETITION FOR REHEARING

(JUNE 14 , 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 31(1) and (2)(a) on this 25th day of July, 1973, three copies of the within and foregoing Petition for Writ of Certiorari were mailed, airmail postage prepaid, to the following counsel for the parties involved:

Mr. Peter G. Nash
General Counsel
National Labor Relations Board
Office of the General Counsel
1717 Pennsylvania Avenue
Washington, D. C. 20570

and

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

I further certify that all parties required to be served have been served.

Walter O. Lambeth,Jr.

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ADDITIONAL APPENDIX

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-181

STATE ELECTRIC SERVICE, INC.,
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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198 NLRB No. 77

D-6421
Panama City, Fla.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

STATE ELECTRIC SERVICE, INC.

and Case 15-CA-4034

LOCAL UNION 1001 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

DECISION AND ORDER

On January 14, 1972, Trial Examiner Eugene E. Dixon issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in the light of the exceptions and brief and has decided to affirm only such of the Trial Examiner's rulings, findings, and conclusions as are consistent with the following.

The issue in this case is whether or not the Respondent, State Electric Service, Inc., violated Section 8(a)(5) and (1) of the Act by refusing to execute and adhere to a collective-bargaining agreement effective September 14,

1970, duly entered into on its behalf by an employer-association with the Charging Party, Local Union 1001 of the International Brotherhood of Electrical Workers, as the duly recognized collective-bargaining representative of Respondent's employees in an appropriate unit.

The Trial Examiner found that the Union, by engaging in a strike on August 21, 1970, violated the no-strike clause of the September 14, 1970, agreement, and that by taking that action without invoking the contractual procedure for resolving disputes the Union absolved the Respondent from any further liability under the contract. Accordingly, he recommended that the complaint be dismissed in its entirety. The Trial Examiner's conclusions are unwarranted by the record.

The facts are in the main undisputed, but have not been set forth fully or accurately by the Trial Examiner. The Union has had successive collective-bargaining contracts with Panama City Electrical Contractors, an employer-association, since 1965, and Respondent has been covered by that associationwide contract since 1967.[1/] The 1969 contract had an expiration date of September 13, 1970. On June 1, 1970, the Union gave notice of its desire to open negotiations for a new agreement. Five bargaining sessions were conducted between June 20 and July 20, at which time, and in accordance with contractually-established procedures, outstanding differences were submitted to the Council

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1/ Prior to 1969, Respondent also signed the association contract, but in 1969 and 1970 the contract was executed on behalf of its members by the Association.

on Industrial Relations for the Electrical Contracting Industry.[2/] The Council handed down its decision on August 21, 1970, resolving all outstanding issues between the parties. As that decision was binding on the parties, there was complete agreement as of August 21 on the new contract to go into effect on September 14. Respondent attended all association meetings until July 20; thereafter it took no part, but never notified the Association or the Union of any intent to withdraw from association bargaining.

Meanwhile, at an undetermined date apparently in late July or early August 1970, a dispute arose between the Union and Respondent as to the proper contract wage rates to be paid by Respondent on a small job at Tyndall Air Force Base near Panama City. The contract provided for an "industrial" rate and a somewhat lower "commercial" rate. The Union's business manager, Piccolo, received a report from the job steward that Respondent was paying the commercial rate. Piccolo felt that the job required payment of the industrial rate and repeatedly attempted to contact Respondent's president, Peterson by telephone, but Peterson never responded. On August 14, Piccolo wrote Peterson that he requested a labor-management meeting as provided for in the contract, but again, Peterson did not respond. On August 20, having been unable to secure any reply from Peterson, Piccolo instructed the Union's job steward on the Tyndall Air

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2/ Cosponsored by National Electrical Contractors Association and International Brotherhood of Electrical Workers.

Force Base job to have the employees fail to report to work the next day. The four employees on that job did not work thereafter. Still Peterson did not contact Piccolo, but rather attempted, unsuccessfully, to resolve the wage issue in his favor by contacting a vice president of the Union in Tampa, Florida.

On August 26, Peterson fired all of his employees and replaced them with "men off the street." Piccolo again attempted to contact Peterson on September 3, when he had an attorney write Peterson a letter requesting that the matter be handled under the contract's grievance procedure.

Contrary to the Trial Examiner's statement, the uncontradicted evidence reveals that the Union did seek to resolve the disagreement through the contractual procedure. Thus, on September 14, 1970, Piccolo wrote Peterson a registered letter advising that he had invoked a Joint Conference Committee Meeting 3/ scheduled for September 16, 1970. Peterson did not reply, nor did he attend the Joint Conference Meeting, where the Committee found that the Respondent had violated the contract by refusing to settle the wage dispute under the grievance machinery of the contract and by not calling the Union for referrals following the discharge as required by the contract.

3/ Both the 1969 and 1970 contracts direct that the Committee meet within 48 hours when notice is given by either party, and that the Committee is to adjust all questions in dispute. If agreement is not reached in 48 hours, the matter is to be referred to the aforementioned Council on Industrial Relations. The Council's decision is final and binding on the parties.

This decision, signed by representatives of the Association and the Union, consisted only of the findings of violations of the contract.

Finally, on February 1, 1971, Piccolo wrote a letter to Peterson, forwarding a copy of the contract with the Association which had gone into effect on September 14, 1970, and asking Peterson his intentions with respect thereto. Peterson never replied.

It is clear that the Respondent can in no way be considered to have timely withdrawn from the Association[4] in the absence of notice to either the Association and/or the Union. There is no claim of acquiescence by the Union, and Respondent's termination of its employees and hiring of new employees, not members of the Union, all occurred after August 21, 1970, when all terms of the new agreement were settled.[5]

We turn then to the major issue in this case, whether the Union's August 21 action of calling the men off the job constituted unusual circumstances such as to absolve Respondent of further obligation to bargaining with the Union.

4/ As found by the Trial Examiner, the Respondent bargained with the Union as part of the Panama City Electrical Contractors and was bound by and intended to be bound by the results of the bargaining conducted by that Association, and both the appropriateness of the unit and the Union's majority status are presumptively established on the basis of the bargaining history. No exceptions were taken to the Trial Examiner's findings in these regards.

Prior to 1969 each member company of the Association signed individually; since then the Association alone signs for all its members.

5/ Retail Associates, Inc., 120 NLRB 388.

The Trial Examiner concluded that the Union did so violate the contract, quoting a no-strike clause which, "provided that all disputes over matters relating to the contract 'must be handled' as per the procedure set forth in the contract." However the no-strike clause which he describes and the dispute settlement procedure which he quotes are all taken from the contract that went into effect on September 14, 1970, after the events in issue herein.

Since the 1969--1970 contract was in effect at the time of the dispute, the validity of the Union's conduct must be determined under that agreement. The no-strike clause in that contract is significantly different from the 1970 clause. Thus, the 1969 provision reads as follows:

> There shall be not [sic] stoppage of work either by strike or lockout because of any proposed changes in the agreement. All such matters must be handled as stated herein.

In contrast the September 14, 1970, new contract contained the following no-strike clause which is substantially broader:

> There shall be no stoppage of work either by strike or lockout because of any proposed changes in the agreement or dispute over matters relating to the agreement. All such matters must be handled as stated herein. [Emphasis supplied.]

Here the work stoppage engaged in by the Union on August 21 clearly involved a dispute over matters relating to the agreement and did not involve proposed changes therein. It

is also patent that the strike occurred as a result of the Respondent's failure to respond to the Union's request for recourse to the contractual procedure. We are thus constrained to conclude that the strike was not proscribed by the limited no-strike clause in the contract then in effect. We note, further, that the Union continued to abide by the contract by submitting the charge of the Company's failure to abide by the contract to the dispute settlement procedure of the contract and invoking the Joint Conference Meeting as described above.

We find, therefore, contrary to the Trial Examiner, that the Union's conduct did not absolve the Respondent from further obligation to deal with the Union, and the Respondent was bound by the 1970 association contract. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to abide by the contract on and after September 14, 1970.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the operations of the Respondent described in section I of the Trial Examiner's Decision, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order that it cease

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing and the entire record in this proceeding, the Board makes the following:

Conclusions of Law

1. State Electric Service, Inc., is engaged in commerce within the meaning of the Act.

2. Local Union 1001 of the International Brotherhood of Electrical Workers is a labor organization within the meaning of the Act.

3. On August 26, 1970, and at all times since, the Union aforesaid has been the exclusive representative of all the employees in an appropriate unit of the Respondent's employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

The unit of the Respondent's employees appropriate for collective bargaining is and has been:

> All employees, including journeymen wiremen and apprentices, employed by Panama City Electrical Contractors, Panama City, Florida, exclusive of all supervisors as defined in the Act.

4. By refusing, on and after September 14, 1970, to abide by the contract entered into on its behalf by Panama City Electrical Contractors with the aforesaid Union as the exclusive representative of the employees,

in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, State Electric Service, Inc., it officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local Union 1001 of the International Brotherhood of Electrical Workers, as exclusive bargaining representative of its employees in the appropriate unit found herein.

(b) Refusing to abide by and give effect to the collective-bargaining agreement entered into between the Association and the Union on September 14, 1970.

(c) Dealing directly and individually with employees in the aforesaid appropriate unit concerning wages and other conditions of employment and hiring employees by means other than those provided for in the aforesaid collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Abide by and give retroactive effect to all the terms of the aforesaid collective-bargaining agreement.

(b) Make whole its employees in the aforesaid bargaining unit for any loss of pay which they may have suffered by reason of the Respondent's refusal to abide by and give effect to the September 14, 1970, collective-bargaining agreement between the Union and the Association in a manner consistent with Board policy in F. W. Woolworth Company, 90 NLRB 289, with interest or backpay to be 6 percent per annum as set forth in Isis Plumbing & Heating Co., 138 NLRB 716, including any other benefits they may have lost by reason of Respondent's unlawful actions.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(d) Post at its Panama City, Florida, facility copies of the attached notice marked "Appendix."6/ Copies of said notice, on forms

6/ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 15, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Jul 31, 1972.

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-15-72
Panama City, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

STATE ELECTRIC SERVICE, INC.

and Case No. 15-CA-4034

LOCAL UNION 1001 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Peyton Lacy, Jr., Esq., of New Orleans, La., for the General Counsel.
Lynn C. Higby, Esq., of Panama City, Fla., for the Respondent.
Mr. Arnold Madison, of Sheffield, Ala., for the Charging Party.
Mr. Frank Piccolo, of Panama City, Fla., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

EUGENE E. DIXON, Trial Examiner: This proceeding brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136), herein called the Act, was heard at Panama City, Florida, on September 21, 1971, pursuant to due notice. The complaint, based on duly served charges filed by Local 1001 of the International Brotherhood of Electrical Workers, on February 11, 1971, was issued on July 20, 1971, by the Regional Director for the Fifteenth Region (New Orleans, Louisiana), on behalf of the General Counsel of the Nationa

Labor Relations Board herein called the General Counsel and the Board.

The complaint as amended alleged that Respondent, State Electric Service Inc., had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing to execute and abide by a collective-bargaining agreement duly entered into with the Union as the duly recognized collective-bargaining agent of Respondent's employees in an appropriate unit.

In its duly filed answer Respondent denied the commission of any unfair labor practices and raised certain affirmative defenses which will be disposed of herein.

Upon the entire record in the base including my observation of the witnesses I make the following:

Findings of Fact

I. Respondent's Business

Respondent is a Florida corporation with its principal office and only place of business located in Panama City, Florida, where it is engaged in the business of commercial and residential electrical contracting. During the 12 months preceding issuance of the complaint which is a representative period Respondent, in the course and conduct of its business operations purchased goods valued in excess of $50,000 from firms which in turn purchased and received said goods from directly outside the State of Florida.

At all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local Union 1001 of the International Brotherhood of Electrical Workers, at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

As noted this case involved a refusal to bargain charge against Respondent on the grounds that Respondent failed to execute, live up to and abide by a collective-bargaining agreement duly entered into on its behalf (and on behalf of other electrical contractors in Panama City, by an association acting for and on behalf of the contractors in question.1/

Respondent contends that in order to establish his case the General Counsel had to prove by a preponderance of the evidence

(1) That Respondent was obliged, contractually, or otherwise to bargain with the Union, which requires proof:

1/ The original complaint alleged only that Respondent unilaterally withdrew from the association and refused "to execute the agreed upon contract . . ." The complaint was amended at the hearing to allege that Respondent "refused to execute and abide by the contract agreed upon between the association and the Union." As the evidence will show, the question of execution of the contract is really not an issue in the case since the contract was duly executed (as had been the previous contract) by representatives of the Association on behalf of the named employers including Respondent.

(a) that there existed a duly authorized employer association which was qualified to bargain on behalf of the Respondent; 2/

(b) the employees of each of the alleged association members constituted an appropriate unit for bargaining purposes;

(c) that a majority of the members of the appropriate bargaining unit have freely designated the Union as their bargaining agent, and 3/

2/ Although the contractors had no formal organization evidenced by a constitution, by-laws and permanent officers, the history of the bargaining shows clearly that the contractors bargained on a multi-employer basis and were bound by and intended to be bound by the results of such bargaining. Indeed, while originally each contractor individually signed the resulting agreements, the two latest contracts, namely the 1969 to 1970 and the 1970 to 1971 contracts (both of which named Respondent as a party) were signed by only two of the contractors as chairman and secretary of the contracting group on behalf of the other contractors all of whose firms names were listed as parties. "Substance rather than legalistic form is all the Board has required in multi-employer bargaining." Town and Country Dairy, 136 NLRB 517, 523.

3/ The appropriate unit and the majority representation questions are presumptively settled on the basis of the prior bargaining history and the current contract absent any valid rebutting evidence. See Sheridon Creations, 106 NLRB 1171.

(2) That Respondent refused to bargain with the Union and that the Respondent's denial was not in good faith or otherwise justified.

Although apparently contending that there was no legal or binding association in existence, Respondent claims that even assuming that the General Counsel has proved (1)(a), (b) and (c) above, the record shows that "Respondent's conduct subsequent to August 21, 1970, was completely justified and otherwise legitimate by reason of the Union's material breach of the no-strike clause in its agreement with Respondent." In this connection the evidence shows as follows:

Sometimes prior to August 21 a dispute arose as to the proper wage rates being paid by Respondent on a small job at Tyndall Airforce Base in Panama City. As pointed out in the General Counsel's brief,

> The contract in effect (G.C. Exh. 4) provides for two wage rates--an industrial rate and a commercial rate which is lower than the industrial rate. (Union Representative) Piccolo received a report from the job steward that Respondent was only paying the commercial rate . . . Piccolo then began to try and contact Peterson 4/ by telephone as he felt that the job required payment of the industrial rate. He left repeated messages. Finally, on August 14, 1970, Piccolo wrote Respondent that

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4/ Respondent's president and owner, Larry Peterson.

> he requested a labor-management meeting on this matter, under the contract . . . Peterson never responded to this letter. Then, on August 20, after having no response from Peterson, Piccolo called the job steward and instructed him to have the employees fail to report to work the next day . . . the employees of State Electric did not work thereafter. Peterson did not contact Piccolo, but instead called the union vice-president named Pate, in Tampa, Florida. . . . Peterson had no real explanation for this action, except that he thought Pate could verify the fact that he was allowed to pay commercial rates on the Tyndall job . . . Peterson never called Piccolo . . ., but instead fired all his employees and hired "men off the street" to replace them . . . Piccolo then had an attorney write Peterson a letter on September 3, 1970 . . . which in essence requested that the matter be handled under the contract's grievance procedure.

The contract included a no-strike clause which provided that all disputes over matters relating to the contract "must be handled, as per the procedure set forth in the contract. This procedure was stated as follows:

> Article I
>
> Section 5
>
> There shall be a Labor-Management Committee of three representing the Union and three representing the Employer. It shall meet regularly at such stated

times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

Section 6

All grievances or questions in dispute shall be adjusted by the duly authorized representatives of each of the parties to this agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer the claim to the Labor-Management Committee.

Section 7

All matter coming before the Labor-Management Committee shall be decided by majority vote. Four members of the Committee, two from each of the parties hereto, shall be a quorum for the transaction of the business, but each party shall have the right to cast the full vote of its membership and it shall be counted as though all were present and voting.

Section 8

Should the Labor-Management Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry, for adjudication. The Council's decisions shall be final and binding on both parties hereto.

Section 9

When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provision and conditions prevailing prior to the time such matters arose, shall not be changed or abrogated pending a decision in such conciliation or arbitration.

Section 10

Vacancies on the joint conference committee shall be filled by the parties of this agreement among whose representation the vacancies exists. No member of the committee shall be permitted to serve during the consideration of any dispute or grievance in which he is directly interested. Each party shall befray the expenses of its own members of the committee. Any incidentals or general expense of the committee mutually agreed upon in evidence shall be borne by the parties.

It is clear from the foregoing that by calling the men out on strike without attempting to place the dispute before the Labor-Management Committee of the Contracting Association 5/ or attempting to place it before

5/ While Peterson's explanation for not returning the Union's telephone calls because he was working on a job out of town leaving Panama City early in the morning and getting back late at night may not tell the whole story, the fact is that his failure to respond to the Union's calls

(continued on next page)

the Council of Industrial Relations for the Electrical Contracting Industry for adjudication the Union violated the contract. I agree with Respondent that this conduct on the part of the Union absolved Respondent from any further liability under the contract. As stated by the court in United Elec., R. & M. Wrks. v. National Labor Rel. Board.; 223 F.2d 338, Cert. denied, 350 U.S. 981, 76 Sup Ct. 466. at page 241:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreement. The prevention of strikes is one of the principal purposes of labor contract and of the Act. A no-strike provision is "the chief advantage which an employer can reasonably expect from a collective bargaining agreement." The walkout was a material breach which justified

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5/(continued)
amounts to nothing more than a failure to settle the dispute at the first stage of the contract disputes machinery. It might also be noted that "No member of the (Labor-Management) Committee shall be permitted to serve during the consideration of any dispute . . . in which he is directly interested."

the subsequent recision of the contract by the Company.

In the circumstances herein I recommend dismissal of the complaint in its entirety.

Dated at Washington, D. C.

s/Eugene E. Dixon
Eugene E. Dixon
Trial Examiner

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local Union 1001 of the International Brotherhood of Electrical Workers, as the exclusive bargaining representative of the employees in the appropriate unit described below.

WE WILL NOT refuse to abide by or give effect to the collective-bargaining agreement entered into between Panama City Electrical Contractors and the Union on September 14, 1970.

WE WILL NOT deal directly or individually with employees in the appropriate unit described below, concerning wages and other conditions of employment nor hire employees by means other than those provided for in the aforesaid collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL abide by and give retroactive effect to all the terms of the aforesaid collective-bargaining agreement.

WE WILL make whole our employees in the

aforesaid bargaining unit for any loss of pay which they may have suffered by reason of our refusal to abide by and give effect to the aforesaid collective-bargaining agreement, including any other benefits they may have lost by reason of our unlawful actions.

The appropriate unit is:

All employees, including journeymen wiremen and apprentices, employed by Panama City Electrical Contractors, Panama City, Florida, exclusive of all supervisors as defined in the Act.

STATE ELECTRIC SERVICE, INC.
(Employer)

Dated_____ By_____
(Representative) (Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower Building, Suite 2700, 1001 Howard Avenue, New Orleans Louisiana 70113, Telephone 504-527-6361.

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 31(1) and (2) (a) on this 2nd day of August, 1973, three copies of the within and foregoing Additional Appendix were mailed, airmail postage prepaid, to the following counsel for the parties involved:

Mr. Peter G. Nash
General Counsel
National Labor Relations Board
Office of the General Counsel
1717 Pennsylvania Avenue
Washington, D. C. 20570

and

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

I further certify that all parties required to be served have been served.

WALTER O. LAMBETH, JR.

2000 Gas Light Tower
Atlanta, Georgia 30303

(404) 521-3240

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-181

STATE ELECTRIC SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to abide by a contract negotiated and executed on its behalf by a multiemployer association.[1] In reaching this conclusion, the Board found that the Company had participated in the 1970-1971 contract negotiation until the final agreement was reached, but thereafter refused to adopt the executed contract, without, however, notifying either the Association or the Union[2] of its intent to withdraw from the multiemployer bargaining association (Add. App. 5, n. 4, 15). The court of appeals found that

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[1] Panama City Electrical Contractors.

[2] Local Union 1001, International Brotherhood of Electrical Workers.

substantial evidence supported the Board's findings and enforced its order (Pet. App. 14). The Company filed a petition for rehearing contending that in *I.C. Refrigeration Service, Inc.*, 200 NLRB No. 107,[3] the Board had changed its position with respect to union acquiescence in employer withdrawal from multiemployer bargaining associations. Although the Company had never asserted in this case that the Union had acquiesced in its withdrawal (Add. App. 5), it contended that the court should reconsider the case in the light of *I.C. Refrigeration*. The court denied the petition (Pet. App. 23).

2. The sole question presented by the petition is whether the court of appeals abused its discretion in denying the petition for rehearing. This issue does not warrant review by this Court. As this Court has stated, "[t]he granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal." *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137. Accord: *Convoy* v. *First National Bank of Jersey City*, 203 U.S. 141, 145. And it is well settled that a court of appeals does not abuse its discretion by refusing to permit a party to raise new issues in a petition for rehearing. *United States* v. *Walton*, 411 F. 2d 283, 292 (C.A. 9); *Mitchell* v. *Greenough*, 100 F. 2d 1006 (C.A. 9), certiorari denied, 306 U.S. 659; *Marion Steam Shovel Co.* v. *Bertino*, 82 F. 2d 945, 946-947 (C.A. 8), certiorari denied, 299 U.S. 556. In fact, since the Company never raised acquiescence as a defense before the Board, it was precluded from raising it before the court by Section 10(e) of the Act, which provides: "No objection that has not been urged before

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[3] *I.C. Refrigeration* was handed down subsequent to the instant Board proceeding, but prior to the filing of briefs in the court below.

the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322, and cases there cited.

3. In any event, *I.C. Refrigeration, supra*, represents no departure from prior Board standards on acquiescence. As the Company recognizes (Pet. 7), the Board has long held that a union may consent to an employer's withdrawal from a multiemployer association even after negotiations have begun. *Retail Associates, Inc.*, 120 NLRB 388, 395. Similarly, the Board has long recognized that a union may be deemed to acquiesce, or consent by implication, to an otherwise untimely withdrawal if its actions are "clearly antithetical" to its claim that the employer has not withdrawn. *The John J. Corbett Press, Inc.*, 163 NLRB 154, 158, enforcement granted, 401 F. 2d 673 (C.A. 2); *C & M Construction Co.*, 147 NLRB 843, 845. The decision in *I.C. Refrigeration, supra*, was merely a particularized application of these principles. It involved only the factual issue of whether the union's willingness to engage in individual bargaining with the recalcitrant employers indicated its acquiescence in their withdrawal from the multiemployer group. 200 NLRB No. 107 at slip op. 10. And see *Publicity Engravers, Inc.*, 161 NLRB 221, 227-228. Neither *I.C. Refrigeration* nor any other Board decision allows unilateral withdrawal without notification or acquiesence.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1973.